H & N Fish Company *and* United Food & Commercial Workers Union, Local 101, AFL–CIO. Case 20–CA–27483

August 6, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On February 3, 1998, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief,[1] and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Amanda Alvarado-Ford, Esq., for the General Counsel.
Beth E. Aspedon, Esq., and *Philip E. Drysdale, Esq. (Fitzgerald, Abbot & Beardsley),* of Oakland, California, for the Respondent.
David Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at San Francisco, California, on October 16, 17, 23, and 24, 1997. On October 8, 1996, United Food & Commercial Workers Union, Local 101, AFL–CIO (the Union) filed the original charge alleging that H & N Fish Company (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act. On July 9, 1997, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent alleging that the Respondent violated Section 8(a)(3) and (1) of the Act. On September 5, 1997 the Union filed an amended charge against the Respondent. On September 9, 1997, the Regional Director issued an amended complaint and notice of hearing against the Respondent, alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging its employee Alyse Ceirante, because of her support for or activities on behalf of a the Union and/or her other protected concerted activities. The Respondent filed timely answers to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the oral and written arguments of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

The Respondent, a corporation with its principal office and place of business in San Francisco, California, has been engaged in the processing, retail, and nonretail sale of fish and seafood products. During the 12 months ending December 31, 1996, the Respondent sold and shipped from its San Francisco, California facilities goods valued in excess of $50,000 directly to customers located outside the State of California. Accordingly, the Respondent admits and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find that at all times material herein the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Alyse Ceirante was originally hired by Kurt Jacobsen, Respondent's operations manager and acting plant manager for its Pier 45 facility, in June 1996, as his administrative assistant. The Pier 45 facility opened on May 1, 1996, and Ceirante was the first person to hold the newly created position of administrative assistant. Upon her hire, Ceirante was told that she was an introductory employee. Jacobsen stated that he did not like the term "probationary employee." Ceirante was told that she would receive a raise in wages if she successfully completed her 90-day introductory period. Ceirante worked in the same office area as Jacobson and Mike Williams, assistant manager at the Pier 45 facility. Respondent's headquarters were located at its Jerrold Avenue facility in San Francisco.

Ceirante reported directly to Jacobsen. Ceirante's duties included organizing and running the office. She was responsible

[1] The Union joined in the exceptions and brief filed by the General Counsel.

[2] Counsel for the General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The General Counsel excepted to the judge's reference to employee Alyse Ceirante as an "introductory" (i.e., probationary) employee at the time of her discharge on October 7, 1996, when in fact, Ceirante's 90-day introductory period ended on September 23. Underlying the exception is the apparent contention that Ceirante's continued employment beyond the 90-day period indicates that the Respondent deemed her performance to be satisfactory. The record establishes, however, that in late September, in conjunction with the end of Ceirante's introductory period, Operations Manager Kurt Jacobsen began preparing her performance evaluation. The judge credited Jacobsen's testimony that he based his decision to terminate Ceirante on what he viewed as her cumulative poor performance during that period, as well as complaints from colleagues and a supplier. Accordingly, we agree with his finding that Ceirante would have been discharged even absent her union and other protected activity.

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

for obtaining information from docking stations and fishing boats and relaying that information to Respondent's Jerrold Avenue offices. Ceirante was also responsible for organizing and forwarding timecards for the Pier 45 employees to the accounting department at Jerrold Avenue.

Beginning in July, employees working at the Pier 45 facility complained to Ceirante regarding what they believed to be discrepancies in their paychecks. There were complaints about the failure to receive holiday pay and the amount of overtime paid to employees. On July 26, employee Marina Baile, along with another employee acting as an interpreter, spoke to Ceirante about shortages in her overtime pay. Ceirante said she would look into the matter.

On July 29, Ceirante spoke to Jacobsen about Baile's overtime. She also pointed out to Jacobsen that the Respondent did not have the required notices from the State of California regarding safety and workers' compensation posted at the Pier 45 facility. Jacobsen directed Ceirante to contact the Respondent's human resources department located at the Jerrold Avenue facility. Pursuant to Jacobsen's direction, Ceirante called Kim Nguyen of human resources. Nguyen said she would look into the matter.

In August, employee Jaime Castro, approached Ceirante and asked why he and other employees had not received holiday pay for the July 4 holiday. Castro complained that at the time of his hire, he was told that he would be paid $7 per hour but after beginning work, he was paid only $6.25 per hour. Castro further told Ceirante that, Pedro Ayala, processing supervisor, had informed the employees that they would receive $7 per hour at the end of 90 days. According to Castro, the employees would also receive fringe benefits after the 90-day period. Castro also complained to Ceirante about alleged shortages in his paycheck and certain working conditions. Ceirante told Castro that "she was going to see what she could do." Ceirante reported these concerns to Robert Bertholf, Respondent's director of employee relations. As a result of Ceirante's actions, the timeclock at the Pier 45 facility was adjusted to correctly reflect Respondent's pay period. In December of 1996, the Respondent compensated employees for any losses suffered by reason of the conflict between the timeclock and the actual payroll period.

During July and August, Ceirante relayed the complaints of employees that they had not received holiday pay for the Fourth of July holiday, to Jacobsen. Jacobsen took the position that the employees were seasonal employees and, therefore, not entitled to holiday pay. It is undisputed, that Ceirante was not pleased by this response.

By July 30, Ceirante had not received the notices she had requested from Nguyen. Jacobsen then directed Ceirante to contact Wayne Mak, the Respondent's payroll clerk. Mak sent Ceirante a copy of the Respondent's overtime standards and a summary of the law regarding overtime. Mak also took the position that the employees were seasonal employees.

During the same time period, in July and August, Ceirante spoke with other female employees about what they perceived as the unsanitary condition of Respondent's bathrooms. Ceirante frequently made these complaints known to Jacobsen.

On August 1, Ceirante attended a safety committee meeting with Jacobsen, Bertholf, Nguyen, Jimmy Ray, warehouse manager, and Abelardo "Billy" De La Rosa, assistant plant supervisor. Ceirante testified that during the first portion of the meeting, Bertholf distributed antiunion materials and then discussed "why unions were bad for the company." Ceirante's notes of the meeting do not show any discussion of a union. I find that the union discussion took place at a separate meeting before the safety committee meeting and outside the presence of employees De La Rosa and Ray. A local of the Teamsters Union was attempting to organize the Respondent's employees at the Jerrold Avenue facility and Bertholf distributed a one page document that was being distributed to employees at the Jerrold Avenue facility stating the Respondent's preference that its employees not sign union authorization cards or join a union. At the meeting, the safety committee discussed issues such as workers' boots, a training program for operation of the forklift and the delay in obtaining lockers for the workers. After this meeting, Ceirante again complained to Jacobsen that she had not received the government agency notices that she had requested from Nguyen.

On August 6, Ceirante obtained a copy of some California Regulations pertaining to the fish industry from a friend. These regulations showed that the Respondent was, in fact, not complying with California's overtime provisions. When Bertholf learned that Ceirante had obtained this material from someone outside the Company he was admittedly upset. Ceirante testified that Bertholf said, "You're already starting off on the wrong foot." While Bertholf denied making this comment, he admitted that he was upset with Ceirante for going "outside the company." I credit Ceirante's testimony over Bertholf's denial.

Ceirante informed Jacobsen of Bertholf's attitude toward her. She explained to Jacobsen that she believed she was helping the Company as well as the employees by straightening out the overtime questions. She said she did not want the company to be liable for fines or lawsuits.

On August 8, Bertholf visited the Pier 45 facility. On that date, Ceirante raised the question of whether the employees would receive holiday pay for the Labor Day holiday. Bertholf responded that he was still looking into the matter of seasonal employment. Ceirante asked if she could hold a meeting with the employees but Bertholf answered that she could not.

On September 9, Ceirante sent Bertholf a memorandum addressing employee concerns about overtime, holiday pay, and night-shift differential. Ceirante testified that while she received no response from Bertholf, on September 17 or 18, Jacobsen told her that Bertholf had received the memorandum and the answers were "no, no and no." (Meaning that the overtime issues had not been resolved, that the employees would not receive holiday pay for Labor Day and would not receive a night-shift differential.) Bertholf denied ever seeing the memorandum. While Jacobsen admitted that Ceirante had showed him the memorandum, he denied telling Ceirante that Bertholf had answered "no" three times. I credit Ceirante's testimony over Jacobsen's denials.

On or about September 10, employee Jody Kauhi reached her 3-month anniversary with the Respondent. Kauhi asked Ceirante whether she would be eligible for a pay raise and fringe benefits. Ceirante told Kauhi she would look into the matter and get back to Kauhi.

On the morning of September 16, the Union began leafleting at the Pier 45 facility. Karl Kramer, union organizer, testified that he handed out a union flyer and union authorization cards to employees. Kramer approached Ayala and told Ayala that he was a union organizer and wanted to assist the employees in forming a union. Ayala told Kramer that he was a supervisor and that he didn't think the Union applied to his situation. Kramer

told Ayala that if the Union was able to improve conditions for everyone, Ayala's conditions could also improve.

Ceirante arrived shortly after the union officials had left that day. Ayala, Mike Williams, assistant plant manager, and Bob O'Neil, live products specialist, were in the office discussing the Union. Williams told Ceirante that if she found any union leaflets she should put them on Jacobsen's desk.

That same day, Ceirante saw Bertholf speak with employee Miguel Menendez and saw Menendez hand a paper to Bertholf. Ceirante later spoke with Menendez and asked the employee if he thought there was enough interest in the plant for her to call the Union. Menendez suggested that Ceirante contact the Union. Later that day, Ceirante called the Union and left a message.

On September 17, Ceirante spoke with employees Menendez and Donald Jones about setting up a union meeting. Ceirante testified that Bertholf held a meeting with employees on September 18 to discuss the Union. I find the correct date was September 16.

On September 22, Ceirante spoke with Eric De Leon about a union meeting. After this conversation, Ceirante observed that De Leon spoke with Ayala. Ayala then entered the office and said to Ceirante, "Eric said you guys are going to have a Union meeting." Ceirante replied, "Oh, Pedro, no se nada." (I don't know anything.) Ayala responded, "Okay, no se nada." Ayala denied this conversation. However, I found Ayala to be a witness unworthy of belief. Ayala's testimony was simply a contrived attempt to release his employer from the unfavorable consequences of his actions. I do not give any weight to his testimony.

On September 22, employee Jaime Castro signed a union authorization card. On September 29, Ayala asked Castro to speak with him outside the office. Ayala told Castro that he heard that Castro was the one passing out union cards to the employees. Castro denied doing so. Ayala replied that if Castro continued with the Union, Ayala would fire him and give him a bad recommendation for future employment. Ayala said that Ceirante was organizing for the Union and that the Respondent was going to catch her soon. About a week later, Ayala told Castro that the Union wasn't any good for the employees and that the secretary, Ceirante, would be "kicked out within a week." Castro answered that he didn't know about the Union and that he didn't have anything to do with the Union. Castro testified that he had, in fact, been passing out union authorization cards. Castro testified that he had not told Ayala the truth about his union activities because of Ayala's threatening statements. The General Counsel specifically stated that the evidence of Ayala's statements to Castro was only offered as evidence of Respondent's knowledge of the union organizing activities and of the Respondent's union animus and not as unfair labor practices.

On October 1, Ray Stanley, owner and captain of the Brigadoon, a fishing boat which was Respondent's sole source of spot prawns, asked Jacobsen to board his boat. Stanley complained to Jacobsen that notwithstanding his prior complaints about Ceirante, she had called him that day. Stanley told Jacobsen to do something about the problem. In the past, Stanley had complained about Ceirante calling him for information while he was fishing. Stanley did not want to reveal any information because he believed he would lose any advantage he had over his competitors. An arrangement had been worked out whereby Bob O'Neil, Respondent's fresh product specialist, and not Ceirante, would speak with Stanley in a special code. Stanley complained to Jacobsen that Ceirante did not need to call him or seek information from him. Stanley also complained that Ceirante had been rude in this conversation.

On October 1, Jacobsen informed Ceirante of Stanley's objections to her conduct. Ceirante complained about Stanley not wanting to furnish information to her. She called Stanley a name and walked out of the office.

On October 3, Stanley wrote Jacobsen a follow up letter complaining about Ceirante's "abusive language" and stating that if the issue was not resolved, he would be forced to take his business elsewhere.[2]

On October 7, Jacobsen terminated Ceirante's employment. According to Ceirante, when she arrived at work that morning, Jacobsen said that she was being terminated. Jacobsen told Ceirante that her "attitude had started great but deteriorated to the point where it was sour. And that he had gotten complaints." Ceirante asked who had complained and Jacobsen responded that it had been the human resources department. According to Ceirante, Jacobsen also mentioned "some other names." Jacobsen asserted that Ceirante was having problems with coworkers and Ceirante asked which ones. Jacobsen answered that Williams, Ayala, and Bob O'Neil had complained about her. Ceirante answered that she had problems with O'Neil and had complained to Jacobsen about inappropriate and offensive remarks made to her by O'Neil. Jacobsen mentioned that Ceirante had failed to complete a packaging inventory. Ceirante admitted not completing that inventory but told Jacobsen that he had told her that there was no urgency to that assignment. Jacobsen then told Ceirante that the "boats" had been complaining about her. Ceirante said, "Kurt, this is all bullshit and you know it as well as I do." Ceirante asserted that she was fired because she had looked up the law (regarding overtime) and because of her concern for the employees' rights. Without responding to this allegation, Jacobsen gave Ceirante her final check.

Jacobsen testified that after he told Ceirante that he was going to terminate her employment, he started to explain his reasons but that Ceirante interrupted him. Jacobsen told Ceirante that she had a poor attitude, that he had received complaints from Ayala, O'Neil and Williams, that he had received complaints from several fisherman and also had received complaints from the human resources and payroll departments. According to Jacobsen, Ceirante stated that she was being fired because she had exercised her right to see that the workers' rights were adhered to. Jacobsen mentioned the inventory sheet that he had asked for and Ceirante admitted that she had forgotten this task but was planning to do it. Ceirante argued that Jacobsen's reasons were all bullshit and that she knew the real reason for the discharge. Ceirante then walked out of the office.

B. Respondent's Defense

The Respondent contends that Ceirante was discharged because of poor work performance. The Respondent offered the testimony of Wayne Mak, payroll clerk, in an attempt to establish that Ceirante had problems reporting employee hours to the payroll department. Mak testified that Ceirante had manually overridden the automatic timeclock in an attempt to correct employee mistakes. Ceirante's action created extra work for Mak who had to recalculate all such timecards. Even after Mak

[2] The above factual findings concerning the Brigadoon are based on the credited testimony of Stanley, which was corroborated by his letter of October 3. Ceirante testified that she never had a telephone conversation with Stanley on or about October 1. I credit Stanley's testimony over her denial.

had informed Ceirante that she should just make hand written notations on the cards, Ceirante continued to punch the timecards for at least another pay period. Mak complained to Kim Nguyen in human resources and that problem stopped but other problems with the timecards continued. Mak also complained to Hong Pham, his supervisor. Jacobsen was informed about the timecard problems by both Bertholf and Williams. Williams told Jacobsen that he did not want to initial the timecards because he did not trust Ceirante's calculations.

The Respondent also offered evidence that Ceirante had difficulty in using the Excel spreadsheet program to properly calculate the cutter tally sheets used to calculate the pay of fish cutters who were paid on a piece rate. Mak testified, and Ceirante admitted, that Ceirante had problems with the Excel spreadsheet program. The Respondent's controller went to the Pier 45 facility to help Ceirante with the program. The controller informed Berthoff that Ceirante did not have strong computer skills. Bertholf reported to Jacobsen that Ceirante's computer skills were not what she had represented them to be. Ceirante's handling of the cutter tally sheets caused the fish cutters to be paid late.

Respondent further argues that Ceirante's misrepresentation of her computer skills substantiates the discharge. Ceirante was hired with the understanding that she would get a raise if she performed satisfactorily during her 90-day introductory period. At the time Ceirante was hired, Berthoff and Jacobsen believed that she had adequate computer skills. Thereafter, Jacobsen learned from Berthoff that Ceirante had exaggerated her computer skills.

Raymond Ray, Respondent's former sales manager, testified that Ceirante did not provide dock station and fishing boat reports in a timely manner. Ceirante admitted that furnishing these reports was her primary responsibility. Ray testified that Ceirante's reports were late 40 to 60 percent of the time. He further testified that he had trouble obtaining afternoon dock station reports which were supposed to be faxed to his home. He further testified that at least 20 to 30 percent of the information contained in the reports was inaccurate. Hong Pham, Respondent's executive vice president, testified that Ceirante's reports were untimely 70 percent of the time. Both Ray and Pham complained to Jacobsen about not receiving reports on time from Ceirante. The records shows that after receiving these complaints, on August 13, Jacobsen spoke to Ceirante and stressed the importance of submitting timely reports.

The Respondent argues that the October 1 and 3 complaints of Stanley were the last straw causing the discharge. As mentioned above, Stanley had worked out an arrangement with O'Neil, Respondent's live product specialist, and Ceirante, to avoid giving information to Ceirante by giving the information in code to O'Neil. Notwithstanding this arrangement, Ceirante called Stanley on October 1 demanding information about Stanley's catch. Stanley refused to give Ceirante the information and an argument ensued. Stanley was angry and vigorously complained to Jacobsen that day. Stanley followed up this conversation with a letter threatening to take his business elsewhere if Jacobsen did not put an end to the problem.

The altercation between Stanley and Ceirante occurred during the time period that Jacobsen was filling out a performance evaluation form for Ceirante as her 90-day introductory period was just ending. The evaluation form then in progress, and never completed, had Ceirante rated unsatisfactory in several categories. The categories included not properly filling out timecards, complaints from coworkers and fishermen, problems with handling stress, and a poor attitude. The evaluation mentioned complaints from the human resources, sales, and payroll departments. Jacobsen also mentioned complaints from Williams, Ayala, and several fishermen. Jacobsen checked with Bertholf and was told that he could discharge Ceirante. Bertholf said that they would prepare a final check that Friday and terminate Ceirante's employment on Monday.

The Respondent's separation form for Ceirante lists as the reason for discharge, "performance/unqualified." In the section for comments, Jacobsen noted a poor attitude, not getting along with coworkers (the coworkers listed were actually supervisors), complaints from other departments, not submitting work in a timely or neat manner and complaints from fishermen. He also noted "follow through on assignments not good."

C. The Supervisory Status of Pedro Ayala

Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The General Counsel contends, and the Respondent denies, that Ayala, the Respondent's processing supervisor, was a supervisor within the meaning of the Act. For the reasons expressed below, I find that Ayala was a supervisor within the meaning of the Act and, therefore, his statements concerning the Union are attributable to the Respondent. the Respondent admits that Ayala routinely reviewed the job applications of employees and made recommendations on hiring. Employee Eric De Leon testified that he was interviewed by Ayala and no one else from the Respondent. That day Ayala hired De Leon to go to work the next day. Billy De La Rosa, Ayala's assistant, testified that Ayala had the authority to fire employees. Employee Jaime Castro testified that Ayala was the Respondent official who laid him off. The Respondent offered no credible evidence to explain or deny the testimony of De La Rosa, De Leon, and Castro.

Several employees testified that if they were going to be late for work they would call Ayala. Further, Ayala granted these employees days off. Employees brought questions about work to Ayala. Ayala assigned work and on occasion transferred employees from one task to another. Ayala also authorized overtime. Ayala was the Respondent official who notified employees of their wage increases and when they were eligible for health benefits. There were a considerable number of employees who spoke only Spanish. The evidence reveals that these employees received their assignments and directions from Ayala exclusively. The Respondent offered no evidence that Ayala's exercise of such authority was based on the direction or supervision of any other manager facts.

Secondary indicia further establish that Ayala was a statutory supervisor. Ayala used the manager's office and attended management meetings. Further, Ayala was salaried and received a fringe benefit package not available to the hourly workers he supervised. Further, if Ayala were not found to be a supervisor, Williams would be the sole supervisor for the entire production and warehouse facility of approximately 30 employees. Based

on all the facts concerning his employment, I find that Ayala is a supervisor within the meaning of Section 2(11) of the Act.

D. Conclusions

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp*., 462 U.S. 393, 399–403 (1983). In *Manno Electric,,* 321 NLRB 278, 280 at fn. 12 (1996), the Board restated the test as follows: The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

For the following reasons, I find that the General Counsel has made a prima facie showing that the Respondent laid off Ceirante in violation of Section 8(a)(3) and (1). The General Counsel has established that the Respondent, through Supervisor Pedro Ayala had knowledge of Ceirante's union activities. On September 22, Ceirante spoke with employee Eric De Leon about a union meeting. Ayala then entered the office and said to Ceirante, "Eric said you guys are going to have a Union meeting." Ceirante replied, "Oh, Pedro, no se nada." Ayala responded, "Okay, no se nada."

On September 29, Ayala asked Jaime Castro to speak with him outside the office. Ayala told Castro that he heard that Castro was the one passing out union cards to the employees. Castro denied doing so. Ayala replied that if Castro continued with the Union that Ayala would fire him and give him a bad recommendation for future employment. Ayala said that Ceirante was organizing for the Union and that the Respondent was going to catch her soon. About a week later, Ayala told Castro that the Union wasn't any good for the employees and that the secretary, Ceirante, would be "kicked out within a week." Castro answered that he didn't know about the Union and that he didn't have anything to do with the Union. Under the facts of this case , I find these statements of Ayala strongly threaten that the Respondent would take punitive action against employees if they continued with their union activities.[3]

Further, Respondent admits that Bertholf was displeased when Ceirante went outside the Company to research California overtime provisions. Ceirante was concerned that fellow employees were not properly being paid overtime. I find that Ceirante's individual action constituted concerted activities as she was working on behalf of fellow employees. Assuming that Ceirante was not a confidential employee, the fact that Ceirante spoke with a friend outside the Company did not remove her conduct from the protection of the Act.[4] The Board has held that in the context of protected concerted activity by employees, a certain degree of leeway is allowed in terms of the manner in which they protect themselves. *Health Care & Retirement Corp.,* 306 NLRB 66 (1992); *Consumers Power Co.,* 282 NLRB 130 (1986).

In the context of Respondent's knowledge of Ceirante's union and protected activities and its animus against such activities, Ceirante was discharged, without warning, only 9 days after Ayala threatened that Ceirante would be "caught" and only 2 days after Ayala threatened that Ceirante would be "kicked out" because of her union activity. Thus, I find that the General Counsel has established a prima facie case that the Respondent discharged Ceirante because of her union and protected concerted activities.

The burden of persuasion shifts to the Respondent to establish that the same action would have taken place in the absence of the employee's protected conduct. Respondent has provided strong evidence that Ceirante did not adequately perform her task of submitting reports from the dock stations and fishing boats in a timely and efficient manner. Ceirante admitted that this was the most important task for her job. In addition there were problems with the timecards and the cutter tally sheets. Further, Jacobsen had received negative comments about her work from Bertholf and Williams. The uncompleted evaluation form shows that, at the end of her introductory period, Ceirante was considered unsatisfactory in filling out timecards, attitude, dealing with a busy office, and working with coworkers and fishermen. Further, complaints from the human resources, sales and payroll departments were noted. However, the determinative issue before me is whether Respondent's dismissal of Ceirante was motivated by the Respondent's belief that her performance was inadequate.

While Jacobsen was in the process of filling out a performance review for Ceirante and determining whether to retain her, he received an angry complaint from Stanley, his exclusive supplier of spot prawns. Stanley followed up this conversation with a letter threatening to take his business elsewhere. As Jacobsen was processing a less than satisfactory evaluation, he learned that Ceirante had alienated a company supplier for apparently no reason. Arrangements had already been made so that Stanley would not have contact with Ceirante but rather would report his information to O'Neil. This display of poor judgment added to an already poor evaluation was the determining factor in Jacobsen's decision to terminate Ceirante's employment. Ceirante compounded this error by complaining to Jacobsen about Stanley and then storming out of the office.

Contrary to the General Counsel's argument, I do not find Respondent's defense to be a pretext. Bertholf had received negative reports about Ceirante from Mak and Pham. Bertholf in turn reported these deficiencies in Ceirante's work to Jacobsen. There were also negative comments from Raymond Ray, Williams, and O'Neil. In addition, Stanley complained to Jacobsen and threatened to take away his business. Jacobsen's actions based on such negative reports and complaints is clearly consistent with business reasons and motivation for the discharge. Reports regarding inferior work performance, whether based on hearsay or not, are consistent with economic motivation. Here, Jacobsen had received complaints from the human resources, sales, and payroll

[3] Such conduct restrains and coerces employees in the exercise of their rights to select a bargaining representative of their own choice. However, as General Counsel specifically stated that the evidence of Ayala's statements to Castro was only offered as evidence of Respondent's knowledge of the Union organizing activities and of Respondent's union animus, I make no finding of a violation of Sec. 8(a)(1).

[4] Since I find that the Respondent has established that Ceirante would have been discharged regardless of her union and concerted activities, I need not reach the question of whether Ceirante was a confidential employee and therefore, not protected, by the Act.

departments. Further, he had received complaints from supervisors and outside fishermen. The number of different parties who complained about Ceirante would give Jacobsen cause to consider discharge. Further, Ceirante was only an introductory employee. Finally, there is no evidence that the Respondent had condoned such behavior in the past or had condoned such conduct from any other employee.

The fact that the Respondent had not issued progressive discipline does not establish its defense as a pretext. It is undisputed that Ceirante was an introductory employee and the first person to hold the newly created position of administrative assistant. Further, there was no evidence that Respondent had an established system of progressive discipline for employees, introductory or otherwise. The Act "does not require that an employer act wisely, or even reasonably; only whether reasonable or unreasonable, that it does not act discriminatorily." *Paramount Metal & Finishing Co.*, 225 NLRB 464, 465 (1976). I find that the Respondent has established that it discharged Ceirante based on perceived deficiencies in her work and because of complaints by a company supplier. As the evidence establishes that Respondent was motivated by perceived deficiencies in Ceirante's performance, I cannot find that a violation of the Act has occurred.

In sum, the discharge of Ceirante does not violate Section 8(a)(1) and (3) if it is motivated by legitimate business reasons. The record as a whole convinces me that this discharge would have occurred as it did whether Ceirante engaged in union or other protected activities. As I have found that the discharge of Ceirante was not unlawfully motivated, I need not consider the Respondent's additional affirmative defense that Ceirante was a confidential employee, not protected by the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated Section 8(a) (3) and (1) of the Act as alleged in the complaint.

Upon the foregoing findings of fact and conclusions of law, and on the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[5]

ORDER

The complaint shall be dismissed in its entirety.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.